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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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DEANA WILLIAMSON
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No. PD-0899-18

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/15/2019
DEANA WILLIAMSON, CLERK

Patrick Jordan, **Appellant**

v.

The State of Texas, **State**

On Discretionary Review From
The Court of Appeals for the Sixth District Court of Texarkana
Cause No: 06-17-00161-CR

Appealed from the 202nd Judicial District Court
Bowie County, Texas, Cause No: 15F0716-202

STATE'S BRIEF ON THE MERITS

Respectfully Submitted:

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ORAL ARGUMENT HAS BEEN GRANTED

I. IDENTITY OF PARTIES AND COUNSEL

The following is a complete list of all the parties to the trial court's judgment as required by the provisions of Rule 38.2(a) of the Texas Rules of Appellate Procedure:

1. Defendant and Appellant:
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4. Presiding Judge at Trial:
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IV. STATEMENT OF THE CASE

On May 26, 2017, the jury did not reach a unanimous decision on Aggravated Assault, and the trial court declared a mistrial for this charge only.[1] The jury convicted Appellant of Deadly Conduct and assessed a punishment of four years in the Institutional Division of Texas Department of Criminal Justice and zero fine. The Sixth Court of Appeals held, among other things, that Appellant was not entitled to a multiple assailant's instruction.[2] The Sixth Court of Appeals denied Appellant's Motion for Rehearing without opinion.[3] However, Judge Burgess filed a detailed dissenting opinion stating he would grant the Motion for Rehearing because the arguments merited discussion. Judge Burgess ultimately indicated the new arguments may not change the result.

V. SUMMARY OF THE ARGUMENTS

Varley and Crumpton did not aid or encourage a hostile group because Appellant did not apprehend any imminent threat from Varley or Crumpton. Any justification against Royal does not transfer to Varley or Crumpton because the State did not argue (or request any instruction on) transferred intent.

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[1] 5 RR 16.

[2] *Jordan v. State*, 558 S.W.3d 173 (Tex. App.—Texarkana 2018, pet. granted).

[3] *Jordan v. State*, 558 S.W.3d 173 (Tex. App.—Texarkana 2018, pet. granted)(op. on reh'g)(Burgess, dissenting).

VI. REPLY TO POINTS OF ERROR I & II

A. Self-Defense Against a Group—No Matter the Association

Appellant's main argument for the first and second issue are interrelated. The State will address each issue together.

1. Introduction

Appellant argues that a self-defense (and multiple assailants) instruction was required because Varley and Crumpton were (1) parties to the hostile group, (2) participants in the fray, or (3) innocent bystanders.

2. Standard of Review

Review of a jury instructions is a two-step process.[4] First, a determination whether error occurred.[5] If error occurred, the reviewing court then analyzes the record to determine whether the error caused harm sufficient to require reversal.[6] A self-defense jury instruction is raised by the evidence if there is some evidence, regardless of its source, on each element of a defense that, if believed by the jury, would support a rational inference that each element of Section 9.32 is true.[7] A reviewing court must rely on its own judgment, formed in the light of its own common sense and experience, as to the limits of a rational inference from the facts

[4] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984); *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).

[5] *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).

[6] *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).

[7] See *Shaw v. State*, 243 S.W. 3d 647, 657-658 (Tex. Crim. App. 2007).

that have been proven.[8] A defendant is entitled to a self-defense instruction "regardless of whether the evidence supporting the defense is weak or contradicted" or "the evidence is not credible."[9] A trial court analyzes all evidence in the record—even evidence offered by the State and the defendant.[10] "A defendant's testimony alone may be sufficient to raise a defensive theory requiring an instruction in the jury charge."[11]

3. Preservation of Error

- **Self-Defense**

Appellant argues that a self-defense instruction is required for Varley and Crumpton regarding deadly conduct, which would require "Summer Varley and Austin Crumpton" as the assailants in the instruction.[12] A trial court shall submit a charge setting forth "the law applicable to the case."[13] A defendant must object or request a special instruction to preserve error for review.[14] The trial court's final jury instruction only included "Jordan Royal" as the assailant.[15] Appellant did not

[8] See *Shaw v. State*, 243 S.W. 3d 647, 657-658 (Tex. Crim. App. 2007).
[9] *Dugar v. State*, 464 S.W.3d 811, 816–17 (Tex. App.—Houston [14th Dist.] 2015).
[10] *Kemph v. State*, 12 S.W.3d 530, 532 (Tex. App.—San Antonio 1999).
[11] *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.—Houston [1st Dist.] 1994).
[12] The trial court included a self-defense instruction for deadly conduct, and "Jordan Royal" is included in that instruction.
[13] Tex. Code Crim. Proc. art. 36.14.
[14] *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); *Arana v. State*, 1 S.W.3d 824, 827 (Tex. App.—Houston [14th Dist.] 1999).
[15] CR 140.

request this language at the charge conference[16], and the proposed written instruction[17] did not include this language. In the proposed jury instruction, neither the self-defense definition[18] nor the Application Section for self-defense on deadly conduct includes either "Jordan Royal, Summer Varley, and Austin Crumpton" or "Summer Varley and Austin Crumpton". Therefore, Appellant waived this self-defense instruction.

- **Transferred Justification**

Appellant argues that any justification in shooting Royal (i.e. the primary assailant) transfers to any individual (i.e. Varley and Crumpton) harmed as a result. Appellant failed to request or object at trial.[19] "The trial judge has the duty to instruct the jury on the law applicable to the case even if defense counsel fails to object to inclusions or exclusions in the charge."[20] "… Article 36.14 imposes no duty on a trial judge to instruct the jury sua sponte on unrequested defensive issues because an unrequested defensive issue is not the law 'applicable to the case.' "[21]The State did

[16] CR 110 (The State also mentioned, "Judge, the only other thing that [Appellant] indicated to the State prior to the Court entering is that we have not included the specific language with regard to the deadly conduct charge").

[17] CR 111.

[18] CR 117.

[19] See *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998)(finding Article 36.14 imposes no duty on a trial judge to instruct the jury sua sponte on unrequested defensive issues because an unrequested defensive issue is not the law "applicable to the case").

[20] *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013).

[21] *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013).

not argue or request an instruction on transferred intent. The proposed jury instruction did not include any transferred intent or transferred justification instruction.[22] Therefore, Appellant failed to preserve this issue.

- **Defense of Others**

Appellant indicates the jury instruction is required to include a general section for "Defense of Others". Also, Appellant argues a self-defense instruction is required for "Summer Varley and Austin Crumpton" or "Jordan Royal, Summer Varley, and Austin Crumpton". At the charge conference, the State informed the trial court that Appellant was requesting "or others" language for defense of others.[23] The proposed jury instruction included a "Defense of Another Person" section and uses "Jordan Royal or others".[24] The proposed jury instruction does not include "Summer Varley and Austin Crumpton". Appellant's brief only mentions "Defense of Others" in each Issue heading and only discusses "others"[25] once. The trial court stated, "I'm not going to put the 'or others' in there" and "[t]hat objection is overruled."[26] This objection does not adequately request a general "Defense of Others" section. The

[22] See *Vega v. State*, 394 S.W.3d 514, 519 (Tex. Crim. App. 2013); *Posey v. State*, 966 S.W.2d 57, 62 (Tex. Crim. App. 1998)(finding Article 36.14 imposes no duty on a trial judge to instruct the jury sua sponte on unrequested defensive issues because an unrequested defensive issue is not the law "applicable to the case").

[23] CR 106.

[24] CR 120.

[25] Appellant's Brief at 11.

[26] 4 RR 107-108.

trial court's final jury instruction did not include a "Defense of Others" section. Therefore, Appellant did not preserve and did not adequately brief this issue.

4. Hostile Group

Appellant argues that Varley and Crumpton were assailants—or at least, members of a hostile group "by aiding, abetting, encouraging … Royal's pursuit of Appellant and Bryan through the parking lot and the anticipated physical conflict."[27]

- **Applicable Law**

"A defendant is entitled to a charge on the right of self-defense against multiple assailants if there is evidence, viewed from the [defendant]'s standpoint, that he was in danger of an unlawful attack or a threatened attack at the hands of more than one assailant."[28] A "reasonable belief" is one that "would be held by an ordinary prudent person in the same circumstances as the [defendant]."[29]

- **Primary Assailants**

Just as the intermediate court concluded[30], Varley or Crumpton were not primary assailants because neither wielded a deadly weapon. "The language of these provisions logically implies that 'the other' who uses or attempts to use unlawful

[27] Appellant's Brief 14.
[28] *Frank v. State,* 688 S.W.2d 863, 868 (Tex.Crim.App.1985).
[29] Tex. Penal Code § 1.07(a)(42).
[30] *Jordan v. State,* 558 S.W.3d 173 (Tex. App.—Texarkana 2018, pet. granted).

force ... is 'the person against whom the force was used.' "[31] In *Gamino v. State*[32], the defendant testified to the following events: the defendant and girlfriend walked past three men in a parking lot. The men threatened the defendant and the girlfriend by making several statements—"grab her ass", "F her if they wanted to," and to "kick [his] ass." The defendant felt scared because he was disabled and the victim aggressively approached him (with only fists). "At the end of the evening, as [defendant and girlfriend] were heading toward his truck, she said that three men confronted them, and one man threatened her. [The girlfiend] testified that she feared for her life." As a result, the defendant pointed his weapon at the three men. The trial court denied a self-defense instruction. The jury convicted the defendant of aggravated assault with a deadly weapon. The Court of Criminal Appeals held that the defendant was entitled to a Section 9.31 (non-deadly force) self-defense instruction because the defendant only threatened the victims with a firearm. This case demonstrates the difference between "deadly force" required for a self-defense instruction and a "deadly weapon" for the underlying offense. Here, the State agrees with the conclusion of Judge Burgess that *Gamino* is inapposite to the case at issue because "[Appellant]'s use of deadly force was not directed against the man who approached him—Royal—but against Crumpton and Varley" and "there was no

[31] See *Macias v. State*, 2015 WL 1181191, at *6 (Tex. App.—Corpus Christi 2015)(mem. op., not designated for publication)(quoting Tex. Penal Code § 9.31(a)(1)).

[32] *Gamino v. State*, 537 S.W.3d 507, 513 (Tex. Crim. App. 2017).

evidence that Crumpton and Varley used or attempted to use unlawful deadly force". Therefore, Appellant was not entitled to a self-defense instruction under this theory.

- **Members of a Hostile Group**

No evidence establishes that Varley nor Crumpton participated, encouraged, or solicited the unlawful attack. Judge Keller's concurrence discussed the parameters of multiple assailants:

> For example, if a defendant were trapped in a house with several hostile individuals, some of whom were brandishing firearms and threatening the defendant, the defendant may be justified in using deadly force against a different person who was blocking an exit that would otherwise be a viable path of retreat. The use of deadly force against the person blocking the exit would be justified, even though that person possessed no firearms and made no threatening moves, because of that person's complicity with those who threatened the defendant's life. The rule concerning multiple assailants is essentially an application of the law of parties to the defendant's assailants.[33]

Prior cases contemplate that a defendant may be entitled to a multiple assailant's instruction when a victim was a "party"[34] or "in any way aiding or encouraging the attack"[35]. "[S]omething more than the victim's mere presence … is required.[36]

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[33] *Dickey v. State*, 22 S.W.3d 490, 493 (Tex. Crim. App. 1999)(Keller, concurring); *State v. Cooper*, 128 N.M. 428, 432 (Ct. App. 1999)("Other courts that have considered this question have held that a multiple aggressor self-defense instruction is warranted even when the person the defendant assaulted never posed a direct threat of bodily harm to the defendant, as long as there is evidence that the person the defendant assaulted participated or acted in concert with the assailant.").

[34] *Horn v. State*, 647 S.W.2d 283 (Tex. Crim. App. 1983); *Black v. State*, 65 Tex. Crim. 336, 343–44 (1912).

[35] *Stacy v. State*, 77 Tex. Crim. 52, 70 (1915)(on motion for rehearing).

[36] *Jordan v. State*, 558 S.W.3d 173 (Tex. App.—Texarkana 2018, pet. granted)(motion for rehearing)(Burgess, dissenting)(interpreting Judge Keller's concurring opinion in *Dickey*).

In *Sanders*[37], a jury convicted the defendant of voluntary manslaughter. The defendant was hit with a pool cue inside a beer joint. The defendant was later diagnosed with a concussion. The defendant ran outside with a group following him. The group did not have a deadly weapon—even though one person was carrying a pool cue. "[The defendant's brother] testified that the white people were yelling and hollering and chasing appellant with a pool cue."[38] The defendant's brother testified that "[the defendant] were coming out the place backing up, falling down, trying to get them other people off him." The defendant testified that "they was running right behind me". "I was running. I was trying to get away from those people." The defendant claimed he merely shot to scare the group but did not intentionally kill the victim. The bullet killed a member of the group.[39] The trial court included self-defense instruction and denied a multiple assailant's instruction. The Court of Criminal Appeals reversed and held that the defendant was entitled to a multiple assailant's instruction.

In *Dickey v. State*[40], the defendant brought the victim over to Mavis' residence. Mavis and the victim got into an argument over money. The victim and Mavis looked at each other and the defendant believed that both Mavis and the

[37] *Sanders v. State*, 632 S.W.2d 346 (Tex. Crim. App. 1982)
[38] *Sanders v. State*, 632 S.W.2d 346, 347 (Tex. Crim. App. 1982).
[39] The *Dugar* opinion analyzed the *Sanders* opinion and included the following fact—"One of the shots struck the decedent, a man who had not attacked the defendant."
[40] *Dickey v. State*, 22 S.W.3d 490, 492 (Tex. Crim. App. 1999).

victim were about to turn on him. There was no actual evidence or actions for defendant to perceive that the two men were colluding. The Court of Criminal Appeals held that the defendant failed to prove harm by the trial court excluding the multiple assailant language in the jury charge. Mavis and Brown were independent parties—even though both may have had the same goal. Similarly, any attempt Varley made to stop Royal, by itself, does not raise any aiding or encouraging. More evidence is needed to establish that Appellant perceived Varley as an assailant.[41] Therefore, Varley was independent of Royal.

(a) Threats

Appellant had a prior relationship and no testimony contradicts Varley was an innocent bystander. Appellant argues that the following statements made Varley a party to the unlawful attack:

> you can't be an asshole to me and come in here and not expect anybody to be upset about that …[42]

"The use of force against another is not justified in response to verbal provocation alone."[43] The first clause—"You can't be an asshole"—implies that Appellant had a negative interaction at some point—either during or prior to that time. But, it does

[41] See *Juarez v. State*, 886 S.W.2d 511, 514 (Tex. App.—Houston [1st Dist.] 1994)("[If] record is silent about the conduct of the seven or eight other men [present] ... [t]here is no evidence to suggest that it was reasonable to think [they] were about to attack with deadly force.")(emphasis added). Here, any unaccounted-for gaps in time inure to the State.

[42] 4 RR 75.

[43] *Gamino v. State*, 537 S.W.3d 507, 513 (Tex. Crim. App. 2017).

not imply Varley was hostile at that moment. The second clause—"I was glad to see him" negates in rational inference of hostility. The third clause—"and no expect someone to get mad"—refers to others solely becoming hostile. In *Kirkpatrick*[44], the court held that the defendant was not entitled to a self-defense instruction when the victim "hollered" and threatened to "kick his ass". In *Bundy*[45], the victim stated, "he would beat [defendant's] ass". The statement "does not indicate any intention to cause death or serious bodily injury as defined by these statutes." The court held that the defendant was not entitled to a self-defense instruction. Varley's statement does not establish any hostile intentions and do not raise self-defense. Therefore, Varley's statement combined with the "attempting to stop Royal" do not raise self-defense.

(b) Conclusory, Non-Specific Statements

Appellant testified that he was "mobbed"[46] and "five people following you out of that restaurant" were "assailants"[47]. "Mobbed" means either "a large or disorderly crowd; especially: one bent on riotous or destructive action".[48] "Mobbed" addresses more of the "how" than the "what". The "how" does not indicate whether Varley or Crumpton were associated with the "mobbed" feeling. Also, a general

[44] *Kirkpatrick v. State*, 633 S.W.2d 357, 358 (Tex. App.—Fort Worth 1982).

[45] *Bundy v. State*, 280 S.W.3d 425, 435 (Tex. App.—Fort Worth 2009).

[46] 4 RR 41; Varley also stated, "I just kind of just had my eye on Jordan, and I was just trying to get him. I didn't really see everyone else. I just know everyone was going after [Appellant]". 4 RR 65-66.

[47] 4 RR 40-41.

[48] "Mob" Merriam-Webster.com. Merriam-Webster, n.d. Web. 20 Apr. 2018.

statement accusing a group as "assailants" without more is not sufficient. None of these statements establish "reasonable" or "fear".[49]

Even if only Appellant's account is considered, no evidence raises a multiple assailant's issue. "Appellant's lack of knowledge as to … what the victims were doing is distinguishable from situations justifying an instruction where there is affirmative evidence of some threat ..."[50] The mere assertion, after-the-fact, that Appellant believed he was under attack by multiple assailants "without evidence of any overt act or words that would lead the accused to reasonably believe he was in danger" is insufficient to support an instruction that Appellant reasonably believed he was under attack from multiple assailants.[51] Here, Appellant concludes (without explanation) that five individuals in the parking lot were assailants. Appellant testified that the he only saw Royal at the time he discharged the firearm. Appellant acknowledged that he was focused on Royal when he discharged the firearm.[52] This testimony by Appellant abrogates Varley's testimony that she attempted to stop Royal. The record lacks any evidence that Appellant believed an attack was imminent from multiple assailants when he discharged the firearm.

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[49] *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.—Houston [1st Dist.] 1994).
[50] *Preston v. State*, 756 S.W.2d 22, 25 (Tex. App.—Houston [14th Dist.] 1988).
[51] *Preston v. State*, 756 S.W.2d 22, 25 (Tex. App.—Houston [14th Dist.] 1988).
[52] 4 RR 39.

(c) Crumpton's Abandonment

No testimony raises the potential of Crumpton's attempted "deadly force". Even if so, any attempted "deadly force" from Crumpton had been abandoned. In *Tanguma*[53], a jury convicted the defendant of murder. The court of appeals addresses the issue of multiple assailants. The defendant testified that "he had not seen or heard [victim's friend] since the very beginning of the fight". The trial court included a self-defense instruction against the victim (who used a knife). The court held no reversible error occurred. Here, Crumpton initially followed Appellant and Bryan into the parking lot.[54] Appellant did elicit testimony suggesting that Crumpton kicked Bryan. The mere fact that Crumpton "running over there to [Bryan] and standing over him"[55] is not sufficient to say an unlawful attack was continuing on Bryan or Appellant. No testimony suggested that Crumpton made any movement towards Appellant. "Crumpton's testimony was not challenged, and nothing suggested that Crumpton used deadly force against Jordan."[56] Appellant testified he did not perceive Crumpton at that time he discharged the firearm. Therefore, like in *Tanguma*, any threat from Crumpton was abandoned.

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[53] *Tanguma v. State*, 721 S.W.2d 408, 412 (Tex. App.—Corpus Christi 1986).
[54] 4 RR 65.
[55] 4 RR 37.
[56] *Jordan v. State*, 558 S.W.3d 173 (Tex. App.—Texarkana 2018, pet. granted).

5. Fray

Appellant argues that a new group should delineated—"in the fray"[57] or "participants" (i.e. an intermediate group).[58] Appellant cites *Dugar* (discussed below) for this contention. The *Dugar* court concluded that a fact issue existed whether the victim was an innocent bystander or an assailant. The common definition[59] of assailant indicates a proactive measure attempting violence. A "participant" in this context seemingly means that the individual is in the group, but the person does not make any overt actions that aids or abets a defendant. In a stretched interpretation, the "participant" may include a passive member of a group (i.e. a person who is within the group but has not made any movement to exhibit hostile behavior). In *Sanders*[60], the defendant exited the beer joint with a group pursing him. The defendant's group was on one side of the parking lot and the hostile group on the other. What if a friend walked to the hostile group to ask what is going on? However, every other person in the group is portraying hostile tendencies. The defendant is not able to differentiate between each member of the group. Then, the

[57] Appellant's Brief at 11 ("A bullet struck Varley as she was in the fray.").

[58] Appellant's Brief at 11 (footnote 5)("Even though Varley, Crumpton, Prichard and Stevenson did not appear to be a primary threat to Appellant and Bryan, they were participants and changed the dynamics of the situation.").

[59] *Assailant*, Black's Law Dictionary (2nd ed. 1910) (last visited on April 12, 2019)("to describe a person who assaults another person."); *Assailant*, Merriam Webster Online, https://www.merriam-webster.com/dictionary/assailant# (last visited on April 12, 2019)("a person who attacks someone violently"); *Assailant*, Oxford English dictionary https://en.oxforddictionaries.com/definition/assailant (last visited on April 12, 2019)("A person who physically attacks another.").

[60] *Sanders v. State*, 632 S.W.2d 346 (Tex. Crim. App. 1982).

defendant fired into an amorphous group where he has perceived each individual being hostile. If the defendant struck the friend, is a defendant entitled to a multiple assailant instruction? In *Ortiz*[61], the court analyzed a similar facts. The defendant was in a vehicle with other occupants and shot into a hostile group. The defendant requested a "defense of others" instruction.

> [T]here was no evidence suggesting that the victim was involved in shooting at the car. There was no evidence that he had a gun or that one was found near his body. There was testimony that he did not have a gun and that he had not fired at the car.

In other words, no evidence was presented that the defendant perceived the victim was a party to the group (i.e. make any actions hostile or aiding co-defendants). The court held that the trial court did not commit error by refusing a defense of others instruction. The facts in *Ortiz* do not explicitly state defendant perceived an amorphous crowd, but the facts delineate enough to determine that each individual group member is analyzed for his or her hostile (or not) actions. This analysis comes down to whether "deadly force" can be used or not against a person. A person in the "fray" is ultimately innocent and ultimately unfair if an individual could use "deadly force" against you solely because of your association with a group. Therefore, the existing rule does not contemplate an intermediate group.

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[61] *Ortiz v. State*, 1999 WL 1054694, at *2 (Tex. App.—Texarkana 1999)(not designated for publication); see also *Stacy v. State*, 77 Tex. Crim. 52, 70 (1915)(op. on reh'g)("The co-defendant "was not in any way making any attack upon [defendant], nor in any way aiding Joe to do so.").

6. Innocent Bystander

Appellant argues that a self-defense instruction was erroneously excluded even if Varley and Crumpton are innocent bystanders.[62] Appellant argues that if any action justified shooting the primary assailant (Royal), then any justification transfers to Varley and Crumpton. Appellant relies on *Jackson v. State*[63] to argue that Appellant is entitled to use deadly force against an innocent bystander because Appellant was justified in using deadly force against the primary aggressor. This argument implies two different scenarios: a pure innocent bystander and transferred justification (i.e. defendant intended to harm Person A but unintentionally strikes Person B).

- **Pure Innocent Bystanders**

Appellant argues that "[a]n individual placed in the decision of bodily integrity or suffering the pain of an unlawful battery is not required to suffer at the hands of his unprovoked assailant."[64] This implies that no matter what—that a defendant may use self-defense in any situation—without exception. However,

[62] Appellant's Brief at 19; in this scenario, Varley and Crumpton have not made any actions for Appellant to perceive Varley and Crumpton are assailants. A logical deduction requires exclusions any multiple assailants' instruction because Varley and Crumpton do not meet the definition of "assailant". Therefore, any relief requested should be limited to solely a self-defense instruction.

[63] *Jackson v. State*, 66 Tex. Crim. 469, 470 (1912).

[64] Appellant's Brief at 13-14.

Texas law does not allow for an innocent bystander to be harmed without more. An appearance of imminent "deadly force" from the innocent bystander is required.

In *Barron v. State*[65], an innocent bystander accompanied a hostile person toward an altercation, but the defendant was not aware the victim did not have hostile intentions. "[D]ecease[d], when killed, had gone to the place where he was killed to prevent or stop the difficulty between his sons and the [defendant's family], and that, at the instant he was shot, his hands were elevated in front towards the [defendant's family], as if imploring them to desist from the shooting."[66] The court held that the defendant was entitled to the proposed charge. The defendant perceived apparent danger from a person in a hostile group. Testimony showed the victim's hands were elevated at the "instant" he was shot, which does not indicate enough time to perceive that he was an innocent bystander. The proposed jury instruction allowed the jury to assess whether the defendant perceived the victim as an innocent bystander—i.e. "not knowing his innocent intention, but believing he was acting and participating with his sons in such unlawful and violent attack". The defendant was entitled to a self-defense instruction.

In *Lackey*[67], the defendant discharged a firearm at an innocent pedestrian approaching him:

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[65] *Barron v. State*, 5 S.W. 237 (Tex. App. 1887).
[66] *Barron v. State*, 5 S.W. 237, 238 (Tex. App. 1887).
[67] *Lackey v. State*, 166 Tex. Crim. 387, 389–90 (1958).

> There is no testimony that prior to the difficulty the [victim] spoke any words, did any act, or made any demonstration of hostility toward the [defendant], other than, as testified by [defendant], to walk toward him. There is no testimony that the [victim] was armed at the time. … The facts presented would not have supported a finding by the jury that [defendant] had reasonable grounds for believing that he was in danger of death or serious bodily injury at the hands of the [victim].

The court held that the defendant was not entitled to non-deadly force self-defense instruction because "a deadly attack was not raised".

As exemplified by *Barron* and *Lackey*, no justification as a matter of law allows harming a pure innocent bystander—without more. Therefore, Appellant is not entitled to a jury instruction (either self-defense or multiple assailants) regarding a pure innocent bystander.

- **Transferred Justification**

Appellant argues that Appellant is more justified than the circumstances in *Jackson v. State*.[68] Specifically, Appellant argues that the "law of the case" established that Appellant was entitled to a self-defense instruction on "aggravated assault", and this instruction inures the self-defense to deadly conduct.[69]

[68] Appellant's Brief at 13 ("If a defendant can avail himself of a self-defense instruction when dealing with an innocent bystander as in *Jackson v. State*, 147 SW 589 (Tex. Ct. Crim. App. 1912), then Appellant is entitled to his instruction here.").

[69] Appellant's Brief at 13 ("[Law of the case] was established by the trial court that self-defense was applicable to the aggravated assault with a deadly weapon charge where [the trial court] gave an instruction on self-defense and an application paragraph.").

(a) Applicable Law

Transferred justification states that a defendant is "justified under the laws of self-defense in shooting at the intended victim, the unintentional killing of an innocent bystander,"[70] "[the defendant] would not be guilty of any offense whatever".[71]

(b) Analysis

Transferred intent is applicable when, for example, a defendant intends to discharge a firearm at one person, but the bullet strikes another person.[72] A transferred intent instruction is allowed when the State argues (and the evidence supports) transferred intent. Appellant relies on *Jackson v. State*[73]. In *Jackson*, the party host ejected Patron from the party. Patron retrieved a firearm, and other partygoers disarmed Patron several times. Eventually, patron put a quart bottle in his holster. "It is left in doubt as to whether [Patron] made the first demonstration with the quart bottle, or [defendant] placed his hand where he subsequently got his pistol." "If it was in the case as to [Patron], then it unquestionably was in the case as to [victim]." The testimony showed that defendant did not intentionally shoot victim—but was intending to shoot Patron. The trial court denied a self-defense instruction.

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[70] *Plummer v. State*, 1878 WL 8989, at *1 (Tex. App. 1878).

[71] 40 C.J.S. Homicide § 179; see also *Brunson v. State*, 764 S.W.2d 888, 891 (Tex. App.—Austin 1989); *Carson v. State*, 57 Tex. Crim. 394, 398–99 (1909); *Caraway v. State*, 263 S.W. 1063 (Tex. Cr. App. 1923).

[72] See Tex. Penal Code § 6.04(b).

[73] *Jackson v. State*, 66 Tex. Crim. 469, 470 (1912).

The court held that the defendant was entitled to a self-defense instruction as it related to Patron.

First, even if *Jackson* applied to our facts, Appellant received the benefit of a self-defense instruction regarding deadly conduct. The trial court submitted a self-defense instruction regarding deadly conduct where Royal was the assailant, and Varley and Crumpton are the victims. Second, Section 9.05 of the Texas Penal Code specifically precludes a justification in that scenario. Section 9.05 states that even if an actor may be justified against another "the justification ... is unavailable in a prosecution for the reckless injury or killing of the innocent third person."[74] Even if justified in using deadly force against Royal, Appellant would not have been justified in recklessly killing an innocent bystander.[75] Third, Appellant did not request any transferred justification language in the Proposed Jury Instruction. Before a transferred justification is allowed, the State is required to pursue a transferred intent argument and request a transferred intent instruction. This was not argued at the trial court. Appellant cannot complain on appeal where he received the benefit of an instruction.[76] Fourth, *Jackson* concerns an accidental killing of an unintended innocent bystander. The defendant intended to kill Patron, but the

[74] Tex. Penal Code § 9.05.

[75] See also *Vidal v. State*, 418 S.W.3d 907, 911 (Tex. App.—Houston [14th Dist.] 2013)(finding court did not err in denying defendant's request for a defense of others instruction under Section 9.33 because defendant was being prosecuted for the reckless injury of an innocent third person, citing section 9.05).

[76] *Powers v. State*, 396 S.W.2d 389 (Tex. Crim. App. 1965).

defendant missed and struck the victim. The defendant did not have any intention of harming the victim.[77] The facts do not support a transferred intent instruction.[78] Appellant did not argue that Appellant aimed at Royal and simply missed the intended target and unintentionally hit Varley (or shot in the direction of Crumpton). Rather, the jury found that Appellant knowingly discharged the firearm in the direction of Varley and Crumpton, which is mutually exclusive of transferred intent.[79] Appellant testified that he knowingly discharged the firearm directly at Royal (and Varley and Crumpton). No evidence was presented that Appellant observed Varley or Crumpton directly in his vicinity immediately prior to discharging the firearm. Therefore, any self-defense justification against Royal does not transfer to Varley and Crumpton.

B. Testimony Did Not Raise Each Element of Self-Defense

Under Section 9.32, a defendant may raise the issue of self-defense, via his own testimony or other evidence, if (1) Section 9.31 requirements are met; (2) the

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[77] *Jackson v. State*, 66 Tex. Crim. 469, 470 (1912)("There seems to be no question of the fact that [defendant] had nothing against [the victim], and may not have seen him; but, be that as it may, if [defendant] fired the shot, it was fired at [the person who had the whisky bottle], and not at [the victim].").

[78] See *Martinez*, 844 S.W.2d at 282 (Tex. App.—San Antonio 1992)(holding court did not err by not charging on transferred intent when theory not supported by the record where defendant intentionally shot victim); see also *Finch v. State*, 2016 WL 2586142, at *6 (Tex. App.—Dallas 2016)(not designated for publication)(holding no charge error for failing to provide a statutory presumption favoring the defendant when not entitled to the presumption based on the evidence); Tex. Code Crim. Proc. art. 36.14 (trial court must provide the jury with "a written charge distinctly setting forth the law applicable to the case.").

[79] *Martinez v. State*, 844 S.W.2d 279, 282 (Tex. App.—San Antonio 1992).

victim caused the defendant to reasonably believe deadly force was immediately necessary; and (3) to protect against the other's use or attempted use of unlawful deadly force.[80] A defendant is "entitled to a jury instruction on self-defense only if he presents some evidence on each of these conditions."[81] "[T]o justify the submission of a charge to the jury on the issue of self-defense, there must be some evidence in the record to show that the defendant was in some apprehension or fear of being the recipient of the unlawful use of force from the complainant."[82] "A defendant's testimony alone may be sufficient to raise a defensive theory requiring an instruction in the jury charge."[83]

1. Protect Against Other's Use or Attempted Use of Unlawful Deadly Force

"[T]o justify the submission of a charge to the jury on the issue of self-defense, there must be some evidence in the record to show that the defendant was in some apprehension or fear of being the recipient of the unlawful use of force from the [victim]."[84] "Deadly force" is force "intended or known by the actor to cause, or in the manner of its use or intended use is capable of causing, death or serious bodily injury."[85] "Serious bodily injury" is an injury that creates a "substantial risk of death

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[80] Tex. Penal Code § 9.32; *Preston v. State*, 756 S.W.2d 22, 24–25 (Tex. App.—Houston [14th Dist.] 1988).
[81] *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.—Houston [1st Dist.] 1994).
[82] *Smith v. State*, 676 S.W.2d 584, 585 (Tex. Crim. App. 1984).
[83] *Halbert v. State*, 881 S.W.2d 121, 124 (Tex. App.—Houston [1st Dist.] 1994).
[84] *Smith v. State*, 676 S.W.2d 584, 585 (Tex. Crim. App. 1984).
[85] Tex. Penal Code § 9.01(3).

or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[86] "A sole attempted punch does not satisfy these definitions."[87] "[C]ourts have not treated blows with fists as deadly force."[88] Discharging a deadly weapon in response to a sole punch is not reasonable response.[89]

In *Halbert*[90], the defendant, who was in a dating relationship with victim, retrieved a firearm and entered the room. The victim started to walk slowly toward defendant while contemporaneously stating the victim was going to kill the defendant. The defendant discharged the firearm. "The mere fact that [defendant] believed [victim] would attack [defendant] is insufficient to give rise to a right to a self-defense instruction." "[T]his belief along with evidence of overt acts or words that would lead [defendant] to reasonably believe [defendant] would be attacked is sufficient to satisfy the statute." The defendant was entitled to a deadly force self-defense instruction. Here, on direct examination, Appellant testified he saw Royal punch Bryan. On cross-examination, Appellant conceded that his back was turned,

[86] Tex. Penal Code § 1.07(a)(46).

[87] *Bundy v. State*, 280 S.W.3d 425, 434–35 (Tex. App.—Fort Worth 2009); see *Schiffert v. State*, 257 S.W.3d 6, 14 (Tex. App.—Fort Worth 2008)(concluding that a punch could not demonstrate an "attempt to use deadly force"); see also *Castilleja v. State*, 2007 WL 2163111, at *4 (Tex. App.—Amarillo 2007)(mem. op., not designated for publication) (holding that a proper response to a fist fight was not deadly force).

[88] *Dearborn v. State*, 420 S.W.3d 366, 378 (Tex. App.—Houston [14th Dist.] 2014).

[89] *Bundy v. State*, 280 S.W.3d 425, 434–35 (Tex. App.—Fort Worth 2009).

[90] *Halbert v. State*, 881 S.W.2d 121, 125 (Tex. App.—Houston [1st Dist.] 1994).

did not observe who assaulted Bryan, and merely heard the result.[91] Appellant heard a loud audible noise and turned around.[92] Appellant saw Royal leaned over Bryan.[93] Royal got up and indicated for Stevenson "to go around."[94] Appellant only stated that Royal motioned for Stevenson to go around to chase Appellant down and pursue him. There was no threat of an unlawful attack. Also, the *Halbert* victim (1) threatened defendant with immediate deadly force (2) while contemporaneously approaching defendant. Unlike *Halbert*, Varley's threat (if any) was sufficiently detached in time to make a rational inference that it is was not an immediate threat. Varley was not running after Royal (or Appellant) while making such a threat.

2. Reasonably Believe Deadly Force was Immediately Necessary

A defendant's perception of apparent danger is the rule unless there is a fact issue whether a person is an innocent bystander or an assailant. The *Dugar* court's interpretation of "apparent danger" stretches the "rational inference" standard toward a defendant. In *Dugar*[95], the jury convicted the defendant of murder. The trial court denied a self-defense instruction because the defendant killed an innocent bystander. Two cars "sandwiched" the defendant's vehicles and chase began. An accident occurred with multiple vehicles. Arguments ensued in a parking lot.

[91] 4 RR 49-50.
[92] 4 RR 37.
[93] 4 RR 37-38.
[94] 4 RR 38.
[95] *Dugar v. State*, 464 S.W.3d 811 (Tex. App.—Houston [14th Dist.] 2015).

Appellant stated the crowd was "vicious" and "ferocious" and blamed the defendant for the accident. Testimony corroborated that the crowd was like an angry mob. One person in the crowd had a gun, and another gun might have been present. As the defendant fled the parking lot in his vehicle, the crowd pursued him on foot. The defendant turned around and shot into the crowd. The bullet struck the victim—who was previously a passenger in the Cadillac. There are conflicting accounts whether the victim was a part of the crowd. "Even though he did not specifically see a gun pointed at him, [defendant] could have reasonably believed that the crowd was pursuing him for a sinister purpose: to shoot him while he was exposed and still within range." The court focused on the "apparent danger" as it is perceived through the defendant's standpoint.[96] The defendant was in a vehicle driving away in a vehicle capable of traveling over 100 mph (or least exponentially faster than the group on foot) and believed that a hostile group (on foot with possible firearms) behind him is an immediate threat. The defendant, while still in the vehicle, shoots at the group behind him and kills a member who did not have a firearm. The court held that the defendant was entitled to a self-defense instruction.

[96] *Dugar v. State*, 464 S.W.3d 811, 818 (Tex. App.—Houston [14th Dist.] 2015)("[U]nder certain circumstances, a person may use deadly force against another, even if the other was not actually using or attempting to use unlawful deadly force.").

3. Defense of Others[97]

The trial court included the following defense of others instruction:

> A person is justified in using force or deadly force against another to protect a third person if- 1) under the circumstances the actor reasonably believes them to be, the actor would be justified, as in self-defense, in using force or deadly force to protect himself against the unlawful force or unlawful deadly force he reasonably believes to be threatening the third person he seeks to protect; and 2) the actor reasonably believes that his intervention is immediately necessary to protect the third person.[98]

Even though the testimony established that Crumpton ran over to Bryan, there was no testimony that Appellant perceived a continuing threat to Bryan nor was there testimony that Appellant shot contemporaneously with the Crumpton running over toward Bryan (i.e. establishing that running over was a threat to Bryan's physical safety needing a defense). Appellant's testimony was that he was consumed with his own defensive issues after Bryan was incapacitated, and no testimony indicating Appellant's immediate need to "defend" Bryan. Royal left the altercation with Bryan and headed toward Appellant. Self-defense based on Royal's actions have clearly been completed. In any event, Appellant only testified to actions after Bryan was assaulted. Appellant testified that the focus left Bryan and went to Appellant as soon as Bryan was punched. There was no testimony as to apprehension of multiple

[97] Appellant mentions defense of others on several occasions. Appellant included a proposed jury charge for defense of others. CR 120-121. Appellant does not argue or include the law on defense of others. As a result, Appellant failed to adequately brief this issue.

[98] CR 138.

assailants against Bryan. The mere fact that Pritchard, Crumpton, and Stevenson followed Royal into the parking lot does not meet the minimal threshold that Appellant's mind felt an apprehension of multiple assailants against Bryan. Therefore, Appellant is not entitled to a defense of others instruction.

4. Conclusion

The trial court, relying on its own judgment, formed in the light of its own common sense and experience as to the limits of a rational inference from the facts presented, did not err in deciding that the issue of self-defense and multiple assailants were not raised by the evidence.

C. Harm Analysis

If error exists, the court reviews the record to determine whether the error caused harm sufficient to require reversal.[99] If a defendant timely objects, a reviewing court should not reverse unless the error caused some harm.[100] The defendant must have suffered some actual, not theoretical, harm.[101] It is the defendant's burden to prove some actual harm occurred.[102] Some harm—actual harm and not theoretical—occurs when the error was "calculated to injure the rights of the

[99] *Abdnor v. State*, 871 S.W.2d 726, 731 (Tex. Crim. App. 1994).
[100] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)
[101] *Warner v. State*, 245 S.W.3d 458, 461 (Tex. Crim. App. 2008); *Arline v. State*, 721 S.W.2d 348, 352 (Tex. Crim. App. 1986).
[102] *Dickey v. State*, 22 S.W.3d 490, 492 (Tex. Crim. App. 1999).

defendant."[103] When analyzing harm, the court should consider (1) the jury charge as a whole; (2) the state of the evidence; (3) counsel's arguments; and (4) all other relevant information from the trial record.[104]

1. Jury Charge

"Texas courts have held that when a defendant claims self-defense, his rights are fully preserved (and the concept of "apparent danger" is properly presented) when a jury charge (1) states that a defendant's conduct is justified if he reasonably believed that the [victim] was using or attempting to use unlawful deadly force against the defendant, and (2) correctly defines 'reasonable belief.' "[105] "In other words, by defining "reasonable belief" in accordance with the penal code, a trial court adequately relates to the jury that 'a reasonable apprehension of danger, whether it be actual or apparent, is all that is required before one is entitled to exercise the right of self-defense against his adversary.' "[106] Here, the jury instructions properly set forth the elements of the offense and justification charge were legally correct in its application of the law to the facts of the case. Also, these

[103] *Almanza*, 686 S.W.2d at 171 ("In other words, an error which has been properly preserved by objection will call for reversal as long as the error is not harmless."); see *Reeves v. State*, 420 S.W.3d 812, 816 (Tex. Crim. App. 2013).

[104] *Almanza*, 686 S.W.2d at 171.

[105] *Bundy v. State*, 280 S.W.3d 425, 430 (Tex. App.—Fort Worth 2009).

[106] *Bundy v. State*, 280 S.W.3d 425, 430 (Tex. App.—Fort Worth 2009).

defensive issues are not the "law applicable to the case" because the testimony did not raise these issues.[107]

2. State of the Evidence

The indictment for deadly conduct listed "Varley and Crumpton" as the victims. This conjunctive language requires both victims. The allowable unit of prosecution for the offense of deadly conduct "is each discharge of the firearm"—than each individual person in a group present when the gun was discharged.[108] The State is required to prove that Appellant discharged the firearm in the presence of both Varley and Crumpton. If the State does not prove Varley was a victim (and vice versa), then the State does not meet its burden. If Appellant is not entitled to a self-defense instruction for Varley, then Appellant is not entitled to a multiple assailant's instruction for Crumpton.

3. Counsel's Arguments

During closing arguments, the State provided an overview of the facts and focuses on the dynamics between Royal, Varley, and Appellant. Both the State and Appellant mentioned "self-defense" and "deadly force", but neither discuss self-

[107] *Rodgers v. State*, 180 S.W.3d 716, 721 (Tex. App.—Waco 2005)("[D]efensive issues (even if statutorily-defined) do not constitute the "law applicable to the case" unless the defendant makes them so by presenting evidence to support their submission in the charge and by requesting their inclusion in the charge."); Appellant does not assert that any error existing within the jury instructions as provided to the jury. The trial court included the correct jury instructions within the law requested by the parties. *Vega v. State*, 394 S.W.3d 514, 520 (Tex. Crim. App. 2013).

[108] *Miles v. State*, 259 S.W.3d 240, 249 (Tex. App.—Texarkana 2008).

defense regarding a specific offense. Referring generally to "self-defense" suggests that both offenses have a self-defense instruction, which the trial court did include a self-defense instruction for both offenses.

4. All Other Relevant Information from the Trial Record

Appellant argues he was left without his fundamental—and only—defense, self-defense. The trial court included a self-defense instruction for both offense, which Appellant argued during closing arguments. The denial of instruction did not cause Appellant to be without any defensive strategy.

VII. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, there being legal and competent evidence sufficient to justify the conviction and punishment assessed in this case and no reversible error appearing in the record of the trial of the case, the State of Texas respectfully prays that this Honorable Court affirm the judgment and below.

Respectfully Submitted:

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VIII. CERTIFICATE OF COMPLIANCE

I, Randle Smolarz, certify that, pursuant to Rule 9 of the Texas Rules of Appellate Procedure, State's Brief contains 6,744 words, exclusive of the caption, identity of parties and counsel, statement regarding oral argument, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, statement of procedural history, signature, proof of service, certification, certificate of compliance, and appendix.

The document was prepared in proportionally-spaced typeface using Times New Roman 14 for text and Times New Roman 12 for footnotes.

/s/ Randle Smolarz
Randle Smolarz

IX. CERTIFICATE OF SERVICE

I, Randle Smolarz, attorney for the State of Texas, Appellee, hereby certify that I have served a true and correct copy of the foregoing Brief for the State upon Attorney for Appellant, along with the State's Prosecuting Attorney's office:

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By electronically sending it through efile to the foregoing email addresses on this, the 15th day of April, 2019.

/s/ Randle Smolarz
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